(1291)

IN THE

Supreme Court of the United States

No. 84—October Term, 1962

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

against

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ATTORNEY GENERAL OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

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Statement

Noia's right to *habeas corpus* is barred by each of three rules of Federal review: (1) he cannot seek to have his conviction set aside on the ground that his constitutional rights were violated at the trial because he has intentionally waived his right to further assert that claim; (2) he has failed to exhaust his state remedies within the meaning of 28 U. S. C. § 2254; and (3) there is an independent and adequate state ground which sustains his conviction.

Reported below: 300 F. 2d 345; certiorari granted, 369 U. S. 869.

POINT I

The record clearly discloses that Noia knowingly and voluntarily chose not to appeal his judgment of conviction. He has, therefore, waived his right to attack that judgment by a Federal *habeas corpus* proceeding.

The Court below has noted that some Federal constitutional rights may be waived at the trial (citing *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 [1942]), or by a conscious and willing failure to appeal (citing *Brown* v. *Allen*, 344 U. S. 443, 503 [1953]).

At his trial, Noia properly and fully asserted his right under the Fourteenth Amendment to exclude a confession that was allegedly coerced. The verdict of the jury, however, was that his confession in fact was uncoerced. Notwithstanding Noia's failure to review that determination by prosecuting an appeal, the Court below has held that he did not waive his right to attack, by a Federal writ of *habeas corpus*, the judgment of conviction. It found that his failure to appeal was not "conscious and willing" because (1) "it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment" (R. 75) and (2) because he did not know then "what he knows now" (R. 76), *i.e.*, that even if the state appeal were unsuccessful, he might ultimately obtain his freedom, rather than face a second trial and the possibility of a death sentence.

We submit that this constitutes a speculative and wholly improper basis for the determination that Noia's failure to appeal was not conscious and willing and that, although the District Court made no finding of fact with respect to the question of waiver, the record clearly establishes the

exercise of a conscious, intelligent and voluntary decision on Noia's part not to appeal.

Following the *habeas corpus* hearing which was held "for the limited purpose of a hearing on the circumstances surrounding the relator's failure to appeal the conviction in the first instance" (R. 62) the District Court found:

> "Relator's trial counsel testified that he had advised relator of his rights to appeal. The relator did not at all deny that he knew of his rights to appeal. He, however, testified that he did not appeal because he had no funds to retain an attorney to prosecute the appeal and did not wish to put his family further into debt. However commendable * * * this motive for not appealing might be, it does not aid the relator."

And, in a footnote, the District Court added (R. 64):

> "I might note, in passing, that absolutely no evidence of the indigency of relator's family was adduced at the trial, except the relator's conclusory statement, despite the fact that there were several spectators at the hearing who were presumably relatives of the relator. In addition, absolutely no explanation was offered by relator for his failure to proceed to adduce any such evidence of indigency."

The rationale, moreover, of the determination by the Court below that Noia's failure to appeal was not "conscious and willing" is patently unsound. Should that thesis be adopted as a general rule, then no defendant in any criminal proceeding could be said to have made a conscious and willing failure to appeal—unless it could be shown that he knew in advance the appellate process would ultimately secure his freedom and that he nevertheless declined to set such procedure in motion.

The Court below, we submit, has clearly given a tortured application to the meaning of a knowing failure to appeal.

POINT II

The requirements of Title 28, § 2254, United States Code, which mandate an exhaustion of State remedies as a condition precedent to invocation of Federal jurisdiction, bar the respondent from obtaining a Federal writ of *habeas corpus*.

We submit that Noia's failure to appeal from his judgment of conviction precludes him from Federal *habeas corpus* relief because of the exhaustion requirements of 28 U. S. C. § 2254.

The Court below, however, has held that, notwithstanding his "past failure to utilize a particular state remedy, Noia would still go free, if his case is sufficiently exceptional" (R. 85), citing *Darr* v. *Burford*, 339 U. S. 200 (1950), and *Frisbie* v. *Collins*, 342 U. S. 519 (1952).

The question in *Darr* v. *Burford*, *supra*, related only to whether, under exceptional circumstances, one might disregard the customary procedure of petitioning for certiorari, this Court noting the issue of Petitioner's failure to appeal "is not before us" (R. 203).

Although this Court, in *Frisbie* v. *Collins*, *supra*, held that the general rule with respect to the denial of *habeas corpus* by Federal Courts to State prisoners if there is available State corrective process "is not rigid and inflexible," it also noted that the State of Michigan failed to discuss the availability of State relief until *after* the Court of Appeals had held the prisoner was entitled to a hearing. Moreover, the exceptional circumstances relied upon by the Court of Appeals involved the forcible abduction and kidnapping by State officers, of persons charged with crimes, from other states, without warrant or extradition, into the

State of Michigan for trial. Certainly, no such element is present here, and as this Court noted the circumstances in the *Frisbie* case, at p. 522, "are peculiar to this case, may never come up again, and a discussion of them could not give precision to the 'special circumstances' rule."

We suggest the proper interpretation of the requirements of 28 U. S. C. § 2254 is found in the dissenting opinion of Judge MOORE, to wit (R. 106):

> "The decision of the Supreme Court in *Daniels v. Allen*, decided *sub nom. Brown v. Allen*, 344 U. S. 443, 1953, clearly controls the issues in this case and requires affirmance of the dismissal of the writ."

POINT III

The presence of an independent and adequate state ground for the decision supporting Noia's detention precludes Federal *habeas corpus* relief.

A state court decision based upon a non-federal ground has been held to be adequate: (1) if it is broad enough, without reference to the federal question, to sustain the state court judgment; (2) if it is independent of the federal question; and (3) if it is tenable rather than arbitrary. *Murdock v. City of Memphis*, 20 Wall. 590, 636 (1874); *Eustis v. Bolles*, 150 U. S. 361, 370 (1893); *Enterprise Irrigation District v. Farmers' Mutual Canal Company*, 243 U. S. 157, 164 (1917); *Postal Telegraph Cable Co. v. City of Newport*, 247 U. S. 464, 475-6 (1918); *Ward v. Board of County Commissioners*, 253 U. S. 17, 22 (1920); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276, 282 (1932).

While the Court below has held that the state ground in this case clearly satisfies all of these requirements, it

has concluded (R. 91) that such ground is nevertheless inadequate.

The obvious rationale of this conclusion is that it is unreasonable here for the State to require the respondent to appeal. "* * * a simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate [because] it still does not sit well on the consciences of civilized men that a man should spend the rest of his life in confinement when it is patent to all that the only reason for his detention is that he did not timely appeal his conviction" (R. 95). But, as Judge MOORE has noted in his dissenting opinion (at R. 106-109) such thesis was specifically *rejected* by this Court in both *Brown* v. *Allen*, 344 U. S. 443 (1953), *supra*, and in *Michel* v. *Louisiana*, 350 U. S. 91 (1955), when it refused to pass upon constitutional claims because of failure to comply with State procedure, despite the fact that the appellants, in both cases, were under *sentence of death*.

In view of the fact that the District Court has found no excuse by the respondent for his failure to appeal, we submit that such failure should be considered adequate to preclude federal review of his claim.

Perhaps the best solution to the problem presented here is indicated in *People* v. *Rizzo*, 246 N. Y. 334 (1927) cited by the Court below. In the *Rizzo* case, *supra*, only one of four co-defendants appealed from the judgment of conviction. The New York Court of Appeals held:

> "A very strange situation has arisen in this case. I called attention to the four defendants who were convicted of this crime of an attempt to commit robbery in the first degree. They were all tried together upon the same evidence, and jointly convicted, and all sentenced to State's prison for varying terms. Rizzo

was the only one of the four to appeal * * * and we have now held that he was not guilty of the crime charged. If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the court; their judgments stand, and they must serve their sentences. This of course is a situation which must in all fairness be met in some way. We, therefore, suggest to the district attorney of Bronx county that he bring the cases of these three men to attention of the Governor to be dealt with as to him seems proper in the light of this opinion" (pp. 339-340).

CONCLUSION

The order of the Court of Appeals should be reversed and that of the District Court should be affirmed.

Albany, New York,
November 26, 1962.

Respectfully submitted,

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